

## IMPACT OF RETALIATORY MOTIVE ON PEER REVIEW IMMUNITY

In *Freilich v. Upper Chesapeake Health System*<sup>1</sup>, the Maryland Court of Appeals examined allegations of retaliatory peer review action against a physician who accused the Hospital of providing poor patient care. Dr. Freilich is a nephrologist with a history of disruptive and abusive conduct towards patients and the nursing staff at two different hospitals in the Chesapeake Health System ("System"). She was subject to numerous written complaints, with 35 issues raised by physicians/staff members and an additional 33 filed by patients. Dr. Freilich argued that the complaints were made in retaliation for her legitimate reports of substandard medical care and attempts to improve the hospital.

The list of allegations raised in these reports reflects a long-term pattern of problematic and inappropriate physician behavior, a situation not uncommon in many hospitals. Like many hospitals, the organization and the medical staff did not immediately confront the issues. Finally, Dr. Freilich was suspended at one System hospital. Dr. Freilich then made incorrect and misleading statements about this suspension in her reapplication for privileges at the other System facility. As a result, the MEC recommended her reapplication be denied. Dr. Freilich requested and was granted a hearing. The hearing committee modified the MEC recommendation, recommending a conditional one year reappointment. On appeal, the Board disagreed, finding that Dr. Freilich's behavior was not correctable because she "...lacked personal insight or understanding of the fact that she has caused multiple problems, which is a prerequisite to their remediability."

In her lawsuit, Dr. Freilich alleged the System did not qualify for peer review immunity because the peer review action was based on "sham complaints," which were made in retaliation for raising valid quality and patient care concerns. To qualify for immunity under the federal Health Care Quality Improvement Act ("HCQIA"), a peer review action must be taken:

1. In the reasonable belief that it is in the furtherance of quality health care;
2. After a reasonable effort to obtain the facts;
3. After adequate notice and hearing procedures or after such other procedures as are fair under the circumstances; and
4. In the reasonable belief the action is warranted by the facts known after a reasonable effort to obtain facts and after meeting the process requirements of paragraph #3.<sup>2</sup>

Under HCQIA, peer review actions are presumed to satisfy the standards for immunity unless this presumption is rebutted by the subject practitioner by a preponderance of the evidence. In alleging the complaints were unfounded and retaliatory, Dr. Freilich was attempting to rebut the presumption of HCQIA immunity by arguing the System failed to meet the first, second and fourth elements required for HCQIA immunity.

The Hospital argued that the subjective motivations underlying a peer review action are irrelevant, as HCQIA immunity is determined by an objective reasonableness standard. The Court disagreed, holding that in assessing objective reasonableness, they look to the totality of the circumstances to assess whether a hospital has met the standards for HCQIA immunity. Any evidence is relevant if it could lead a rational person to conclude the immunity standards were not met, including evidence suggestive of retaliatory motive or that the peer review action was not based on physician competence or professional conduct.

However, the Court also ruled Dr. Freilich failed to establish a connection between the allegations of retaliation and the peer review action. "Evidence of retaliation is simply one of several factors to be considered when determining whether, in the totality of the circumstances, the professional review action satisfied the standards for immunity set forth in HCQIA."<sup>3</sup> While some physicians and nurses may have filed sham reports against the physician, there was no evidence such reports served as the basis for the peer review action. Finally, the Court commented, "The picture emerges that, although each incident may not have happened exactly as the complainant portrayed it, Dr. Freilich conducts herself in a manner that causes offense to patient, nurses, other doctors, and other hospital personnel."<sup>4</sup>

The lessons from Freilich include:

- Evidence of retaliation or other improper motives will be considered by a court in assessing qualification for federal peer review immunity;
- Failing to address disruptive behavior leads to staff animosity towards the physician, which may undermine the credibility of legitimate allegations;
- A strong documented record of behavioral issues is essential in disruptive physician cases. The reports should be accurate and complete but need not be perfect;
- A Board should send a peer review decision with indications of improper motive back to an MEC or hearing panel to reconsider the issue without inclusion of such evidence; and
- Effective risk management of peer review matters begins at the investigative phase.

Should you have any questions about the information contained in this article, please contact James B. Hogan at (317) 977-1439 or [jhogan@hallrender.com](mailto:jhogan@hallrender.com) or your regular Hall Render attorney.

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<sup>1</sup> 16 A.3d 977 (Md. 2011).

<sup>2</sup> 42 U.S.C. §11112(a).

<sup>3</sup> 33 A.3d 932, 942.

<sup>4</sup> 33 A.3d 932, 946.